



Via Email

August 28, 2009

Elizabeth Murphy
Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Facilitating Shareholder Director Nominations (Release Nos. 33-9046; 34-60089; IC-28765; File Number S7-10-09)

Dear Ms. Murphy:

The American Business Conference (ABC) is a coalition of CEOs of midsize growth companies founded in 1981 by Arthur Levitt, Jr. ABC's current chairman is Alfred West, CEO of SEI Investments, Oaks, Pennsylvania.

We are writing to comment on the Commission's proposal to require a public company to include in its proxy materials, under certain circumstances, a shareholder's or group of shareholders' nominees for director – a proposal which we refer to in this comment letter as proxy access.

General Comments We note that the rationale for the proposal seems to be that access to the proxy would restore investor confidence. As we have noted in a previous comment letter, ABC would again observe that “investor confidence” is a terribly thin reed on which to base a Commission rulemaking.¹

The old management cliché “if you can't measure it, you can't manage it” is relevant here. While we understand investor protection and disclosure, we do

¹ See letter of John Endean, President, American Business Conference to Elizabeth M. Murphy, Secretary, U.S. Securities and Exchange Commission, Re: Amendments to Regulation SHO (Release No. 34-59748; File No. S7-08-09, June 19, 2009.

not know what “investor confidence” is or how it can be measured, much less managed. It has no standard definition. More important, the Commission has no mandate to define, measure, or promote it.

Since it is not defined or capable of measurement, “investor confidence” is more a mood or impulse than a concept. It can be used to justify any new regulation that can garner the votes of three Commissioners.

Like “public policy” in judicial decisions, investor confidence is “a very unruly horse, and when once you get astride it, you never know where it will carry you.”² We recommend that the Commission dismount this particular steed.

How Proxy Access Will Likely Be Used One group that we are confident will use proxy access are so-called “relational” hedge funds with a short-term focus. Their likely targets will include conservatively managed mid-sized firms with cash reserves or marketable assets. In this regard, the proposal’s 25 percent limitation on board seats sought is insufficient protection against the standard “raider” strategy.

Empowering hedge funds is not among the Commission’s goals in advancing proxy access. Instead, the Commission presents its proxy access proposal as providing shareholders with a means, via the proxy process, to replicate their right to make a director nomination from the floor of an annual meeting.

We disagree with this justification. After all, an annual meeting is an open forum fully visible to shareholders and the financial press. By contrast, no public filing is required for a shareholder to indicate an intention to exercise the new right under proposed rule 14a-11. This new right need not, and often will not, be used in the open.

In practice, a Commission-created right to access the company proxy will give large shareholders, who owe no duty to the corporation or other shareholders, a new tool with which to influence the company for their own purposes. As shareholder activists have at times conceded, they seek leverage aimed at extracting concessions in “quiet” meeting with management, concessions that the majority of shareholders only hear about, if at all, when the deal is done.³

² *Richardson v Mellish* [1824] 2 Bing 229, 252 (Burroughs, J.).

³ See, e.g., Letter of John Endean, President, American Business Conference to Nancy M. Morris, Secretary, United States Securities and Exchange Commission, Re: Shareholder Proposals (File Number: S7-16-07 and Shareholder Proposals Relating to the Election of Directors (File Number: S7-17-07), October 5, 2007, note 7.

Proxy access will afford activists a considerable amount of the leverage they seek, in addition to the leverage that traditional threats of a full-fledged proxy fight or the launching of precatory shareholder resolutions already provide.

A realistic assessment of the proposed access rules is *not* whether they would replicate or extend an open, public meeting of shareholders. Instead, these rules are the latest battle in a decades-long struggle over control of the corporation between management and big institutional shareholders.

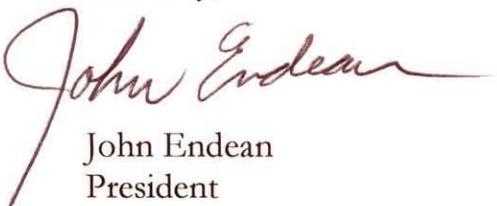
Everyone conversant with this issue knows this, of course. We think it would have been wise for the Commission to explain in its proposal what sort of special wisdom or management expertise it finds within the institutional investment community – and in proxy advisory companies – that warrants this proposed shift of power, a shift that would have an impact on management, boards, and individual investors, who, like all shareholders, pay for the proxy process but are otherwise uninvolved in the proxy access debate.

Conclusion Even if proxy access would improve corporate governance – a proposition about which we are highly dubious – the Commission’s top down, one-size-fits-all approach is unnecessary.

ABC believes that state law and shareholder choice offer a better way. Just as majority voting for directors has steadily been adopted by companies, boards will respond to demands for proxy access, now that it is permissible under state law, and provided that proxy access is shown to have real utility at companies that are the first to implement it.

As others have pointed out, if shareholders are to have the power to nominate directors on a par similar to the board, shareholders ought certainly to be able to determine the limits within which that power can be exercised. This is the key point ignored, we regret to say, by the Commission’s proxy access proposal.

Sincerely,



John Endean
President